

From: [ANDERSON Jim M](#)
To: [Eric Bilschke/R10/USEPA/US/EPA](#); [Chip Humphrey/R10/USEPA/US/EPA](#)
Cc: [BURKHOLDER Kurt](#); [Perry Lynne](#)
Subject: FW: PH ARARs package
Date: 12/24/2009 09:43 AM
Attachments: [Enclosure122209.doc](#)
[Encl1ARARs1209.xls](#)
[RevisedEPAcoverletterARARs.doc](#)

Eric,

From your 12/22 e-mail & in recent conversations, you made it clear you wanted to get EPA's "ARARs Identification Letter" out to the LWG before the end of the year. I told you that I still needed to discuss several issues with OR DOJ re: EPA's 12/22 version of the letter/attachments..., & that I didn't think we would finish those discussions until late- or mid-1/10. I was able to meet with DOJ 12/23 & I also just received some comments from DOJ re: DSL concerns with EPA's letter. So I think I've captured all the concerns we wanted to send you re: your letter..., & those concerns are presented below in this e-mail. To be clear, the comments below are the comments I thought would take us until late- or mid-1/10 to develop. I understand you're out of the office until 1/4/10. Please reply or call me with any questions or concerns.

Comments on Table 1- ARARs for Remedial Action

1) Safe Drinking Water Act- DEQ doesn't agree that SDWA MCLs are "...relevant and appropriate as a performance standard for groundwater...". 1st, the PH BHRA concludes the drinking water pathway essentially shows no acceptable risk, so no remedy is required. The exposure model for the PH HH Risk Assessment (HHRA) **doesn't** contemplate direct human contact with TZW. That means that the exposure point concentrations the LWG used in the HHRA were from surface water, not TZW. The HHRA concluded that there was not unacceptable risk for the drinking water pathway. If there's no unacceptable risk, there's no need for a remedy. Furthermore, the LWG hasn't collected upland GW data & PH FS isn't considering GW remedies in the FS. 2nd, in your recent statements to PH stakeholders..., EPA restricts application of MCLs to GW plumes only. Contaminant concentrations in TZW exceeding MCLs can come from either GW plumes or clean GW discharging thru contaminated sediment & contamination partitioning to the GW. EPA is only concerned with GW plumes..., & the LWG isn't even estimating the TZW concentrations from clean GW discharging thru contaminated sediment. At the point of exposure, the receptor doesn't care whether contamination is coming from a GW plume or from clean GW advecting thru contaminated sediment. 3rd, the PH MOU describes how upland source control is supposed to be done under State authority. State Cleanup rules require us to look at current & reasonably likely future beneficial uses of water (including shallow groundwater as drinking water), & those rules may not allow us to require cleaning plumes up to MCLs.

There are other concerns we have about EPA's position of applying MCLs to GW plumes & different considerations we'd like to discuss with EPA. However, at this time perhaps the most expedient thing to do is for EPA to send the "ARARs Identification Letter" to the LWG, see how the LWG responds to it, & see how these issues are resolved.

- 2) OR Environmental Cleanup Law- In the "Criterion/Standard" column, revise the sentence to read: "For hot spots of contamination in water, requires treatment, *if feasible*; when treatment would be..." (revision in italics)
- 3) OR Environmental Cleanup Law- In the "Applicability/Appropriateness" column, revise the sentence to read: "...treatment of contaminated media to levels below such risk levels *or beneficial-use impacts* needs to be evaluated..." (revision in italics)
- 4) OR Environmental Cleanup Law- In the "Applicability/Appropriateness" column, revise the sentence to read "...set forth in subpart 0115(32), treatment *(including excavation and off-site disposal)* of contaminated media...", (revision in italics)
- 5) Hazardous Waste Management Rules- The "Hazardous Waste Management Rules" text should be moved to the 1st column & the Citation should be ORS 466.055 et. seq.
- 6) Hazardous Waste Management Rules- The HW Mgmt Rules include more than the text currently included in the "Criterion/Standard" column. See DEQ's 6/2/09 e-mail transmitting State ARARs we identified.
- 7) Solid Waste Rules- The "Solid Waste Rules" text should be moved to the 1st column & the Citation should be ORS 459.005 et. seq., OAR 340-093 et. seq., & OAR 340-095 et. seq. Furthermore, the Solid Waste Mgmt Rules include more than the text currently included in the "Criterion/Standard" column. See DEQ's 6/2/09 e-mail transmitting State ARARs we identified.
- 8) Rules Governing the Issuance and Enforcement of Removal-Fill Authorizations within the Waters of Oregon Including Wetlands- The "Rules Governing the Issuance..." text should be moved to the 1st column & the Citation should be ORS 196.795 & .800 et. seq. & OAR 141-085 et. seq.
- 9) Rules Governing the Issuance and Enforcement of Removal-Fill Authorizations within the Waters of Oregon Including Wetlands- In the "Criterion/Standard" column, revise the sentence to read: "Substantive requirements for dredge and fill activities in waters of the state, *including in designated Essential Indigenous Anadromous Salmonid Habitat*." (revision in italics)

Comments on Enclosure 2- Regulations, Guidance, Etc. Determined not to be ARARs

- 1) OR Environmental Cleanup Law- DEQ disagrees with EPA's argument that these rules are "discretionary"..., see OAR 340-122-0090(6). At a minimum, EPA should consider these rules to be TBC.
- 2) Rules Governing the Issuance and Enforcement of Removal-Fill Authorizations within the Waters of Oregon Including Wetlands- Division 85 addresses removal/fill on both ESH and non-ESH, & cross-references Division 102 for certain limited purposes (e.g., designation of ESH). OAR 141 Div 102 need not be cited independently as an ARAR, but it is applicable to the extent cross-referenced by Div 85. Our key concern is that when read together, the 2 tables appear to carve out ORS 196.810(1)(b) & ESH designated areas for all purposes. Finally, CERCLA may allow waiving the requirement to obtain a permit from ODF&W, but substantive requirements are still in effect.
- 3) Lower Willamette River Management Plan- DSL is not objecting to removal of the LWRMP from the list of ARARs. That said, the LWRMP provides guidance and direction (including conditions and specific criteria) not only with respect to DSL's regulatory interests, but also with respect to state proprietary interests. The LWRMP does include a limited waiver, as EPA notes. But it also includes a prohibition on the deposit or storage on state-owned submerged and submersible land of certain materials removed during cleanup, absent approval by the State Land Board, and allows the Director to impose conditions deemed necessary to protect public trust values. Regardless of whether EPA deems the LWRMP an ARAR, it remains very relevant to the administration of state proprietary interests in the Harbor. To that end, even if the LWRMP is relegated to a list of items determined not to be ARARs, we suggest that the explanation circulated with that determination not dismiss the relevance of the LWRMP altogether.
- 4) Guidance for Conducting Beneficial Water Use Determination at Environmental Cleanup Sites & Guidance for Consideration of Land Use in environmental Remedial Actions- "Standards" & "stringency" are not TBC criteria 40 CFR300.400(g)(3) & NCP Preamble. Furthermore the NCP requires EPA to address beneficial use.
- 5) 2 Footnotes- The table is accurate as it is & the footnotes are unnecessary & should be removed.

Jim Anderson

Manager, DEQ Portland Harbor Section

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-----Original Message-----

From: Blischke.Eric@epamail.epa.gov [<mailto:Blischke.Eric@epamail.epa.gov>]

Sent: Tuesday, December 22, 2009 10:08 AM

To: ANDERSON Jim M

Cc: Humphrey.Chip@epamail.epa.gov

Subject: Re: FW: PH ARARs package

Jim, EPA has considered your comments below. Based on Lori's analysis, EPA does not agree that the land and water use determinations, removal-fill requirements related to salmonid habitat nor the lower Willamette River Management Plan are ARARs. We have amended the table to reflect more accurately the basis for our determination. The changes are summarized below:

Land and Water Use: This requirement does not contain substantive standards, is only procedural and thus not an ARAR.

Removal Fill - Essential Indigenous Anadromous Salmonid Habitat: We state that if the ODF designation encompasses more area than the NMFS designation, we will use the state designation in the FS.

Willamette Basin Program - Highest and Best Use Water Classification:

We state that if the FS will use Willamette River surface or groundwater in the cleanup, we will reconsider which of the relevant statutory or regulatory requirements may be TCBs. However, under current circumstances, we do not expect this to be the case.

I am interested in sending out our cover letter with the two tables to the LWG prior to Christmas. This would not include the discussion presented in Table 2. It could be that the MCL discussion is really a discussion between EPA and the LWG. The revised cover letter and tables are attached. If absolutely necessary, we can wait until the new year to send this out. However, that is not my preference. Please give me a call to discuss further.

Thanks, Eric

(See attached file: Enclosure2122209.doc)(See attached file:

Encl1ARARs1209.xls)(See attached file: RevisedEPACoverLetterARARs.doc)

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| From: |

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| "ANDERSON Jim M"
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| To: |

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| Eric Blischke/R10/USEPA/US@EPA, Chip
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Chip & Eric,

During our 12/16 TCT mtg we briefly discussed DEQ's concerns..., based on our preliminary & limited review..., on EPA's "PH ARARs package" (Chip's

12/11/09 e-mail below). I understand EPA wants to finalize this document & submit it to the LWG ASAP to preserve the project schedule as best as possible. I fully support accelerating &/or preserving the project schedule. However, based on our preliminary & limited review..., we have a number of significant concerns with the "PH ARARs package", but we have not had the chance to fully review the document or discuss the document with Oregon DOJ. During the 12/16 TCT mtg, we agreed that since DEQ wouldn't give you a comprehensive review of the "PH ARARs package"..., that we would provide you comments on Enclosure 3 & provide you with a timeframe for our review of "PH ARARs package".

1) Comment on Enclosure 3 "Regulations, Guidance, Etc. Determined

Not to be ARARs"- Enclosure 3 lists & discusses the certain regulations, guidance, etc previously identified by DEQ, the LWG &/or others. Here are my specific comments.

a) OR Environmental CU Law- Current & reasonably likely land &

beneficial water uses- You recommend dropping these regulations because they are less stringent than CERCLA. I recommend they are retained because I'm not sure CERCLA statutory requirements will necessarily trump State law in the uplands. This issue will be further considered in our review of the "PH ARARs package".

b) Removal-fill in OR Essential Indigenous Anadromous Salmonid

Habitat- This is a Division of State Lands regulation that I ask Cy Young to weigh-in on.

c) OR T&E Wildlife Species- Incidental Take Permits- I agree that

no federal, state, or local permits are required for on-site CERCLA response actions, but those actions must still comply with the substantive requirements of the permit.

d) Lower Willamette River Management Plan- This is a Division of State Lands regulation that I ask Cy Young to weigh-in on.

e) Classification of Water as to Highest and Best Use- Willamette Basin Program- I'm OK with dropping this.

f) Guidance for Identification of Hot Spots- I'm OK dropping this guidance as a TBC..., particularly because your list of State ARARs specifically identifies state hot spots regulations.

g) Guidance for Conducting Beneficial Water Use Determination at Environmental CU Sites- I'm OK with dropping this guidance as a TBC. As I stated above, I'm not sure CERCLA statutory requirements will necessarily apply or be relevant & appropriate to the uplands. This issue will be further considered in our review of the "PH ARARs package".

h) Guidance of Consideration of Land Use in Environmental Remedial Actions- I'm OK with dropping this.

i) State Harbor Line Statute- I'm OK with dropping this.

j) Watershed Management & Enhancement & the OR Plan- I'm OK dropping this.

2) Provide you a timeframe for DEQ's review of the "PH ARARs

Package"- Again, I realize you want to finalize your letter to the LWG ASAP., & I want to support that timeframe. However, I won't be able to meet with DOJ until after the 1st of the year. I'll focus my attention on the issue & try to fully reply to the draft letter by late-1/10 or earlier if possible. I'll offer to discuss our review & our intentions regarding possibly disputing the issues prior to submitting a reply to your draft letter.

Cy & Lynne,

Please note I've asked you to look at 2 DSL regulations [b) & d) above] that EPA wants to drop as ARARs.

Jim Anderson

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-----Original Message-----

From: Humphrey.Chip@epamail.epa.gov [<mailto:Humphrey.Chip@epamail.epa.gov>]

Sent: Friday, December 11, 2009 3:34 PM

To: Shephard.Burt@epamail.epa.gov; Davoli.Dana@epamail.epa.gov; GAINER Tom; Grepo-Grove.Gina@epamail.epa.gov; PETERSON Jenn L; jeremy_buck@fws.gov; ANDERSON Jim M; Goulet.Joe@epamail.epa.gov; Smith.Judy@epamail.epa.gov;

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Cc: Blischke.Eric@epamail.epa.gov

Subject: PH ARARs package

PH team

Attached is the latest version of the ARARs package that we have been

preparing for transmittal to the LWG. This will be one part of EPA's

overall guidance to the LWG to keep the FS moving forward. In addition

to the ARARs, we are also working on a response to the LWG's Nov 17th FS Alternatives presentation and preliminary comments on the risk assessments.

The ARARs package includes a cover letter and 3 enclosures

- the full list of ARARs identified to date for use in the FS evaluations
- EPA's rationale on application of SDWA and AWQC
- list of regulations and guidance that may have been previously proposed as ARARs or TBCs but EPA has determined are not ARARs

Our goal is to send this package to the LWG by the end of next week if possible. Please let us know if you have any comments before the end of

the week. We can set up time during next weeks TCT to discuss these or

set up a separate discussion if that works better.

thanks

Chip

(See attached file: EPAcoverletterARARs.doc)

(See attached file: CompARARslist1209.xls)

(See attached file: ARARSEnclosure2121109.doc)

(See attached file: Enclosure3 RegsGuidance notARARs 121109.doc)

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